jurisdiction." With such a broad basis of jurisdiction, it would seem that nearly every dispute regarding trade union affairs among the members of the union would be justiciable in the courts. Should this policy be accepted, the student of contemporary economic and industrial problems cannot but foresee an interminable mass of new litigation confronting American judicial tribunals with the rapid growth of the trade union movement.

In order to discourage the appeal of such disputes to courts of equity, most of the cases have adhered to the rule that the aggrieved party must exhaust the remedies provided by the constitution or by-laws of his union or association before he can appeal to the courts.[18] Other cases have held that where the union has acted illegally in expelling a member in violation of its constitution or by-laws, appeal may be taken immediately and directly to the courts instead of first exhausting the remedies in the union.[19] Where the conditions for appeal within the union are so burdensome as to be almost prohibitive, the courts will take cognizance of the case at once.[20]

THE HARRISON NARCOTIC ACT.—The ever-increasing number of persons in the United States addicted to the use of habit-forming drugs and the demoralizing and destructive consequences that result therefrom led Congress in 1909[1] to enact measures in restraint of the traffic in opium, its derivatives and preparations. The Harrison Narcotic Act[2] buttressed the act of 1909, further circumscribing the traffic in these drugs. It is not, however, within the province of this note to trace the history of the attempt of Congress to cope with the drug traffic or to comment upon the effect these measures have had in arresting the course of the evil.

[2] Act Dec. 17, 1914, c. 1, 38 Stat. 786, Comp. Stat. '16, § 6287h.

The passage of the Harrison Act gave rise to grave questions as to the constitutionality of the statute. In form the act is a revenue measure, in its operation it affects the moral and social welfare of the citizens of the States. "The power to tax" as Chief Justice Marshall expressed it,[3] "involves the power to destroy," and the exercise of its power to tax gives Congress a formidable

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[18] Raych *v.* Hadida, 130 N. Y. Supp. 346; Brown *v.* Harris County, etc., Society (Tex.), 194 S. W. 1179.

[19] Swaine *v.* Miller, *supra;* Fales *v.* Musicians', etc., Union (R. I.), 99 Atl. 823.

[20] Weiss *v.* Musical, etc., Union, *supra.*

[1] Approved Feb. 9, 1909, 35 Stat. 614, c. 100, § 1, Comp. Stat. '16 § 8800. "That after the first day of April, 1909, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law."

[3] McCulloch *v.* Maryland, 4 Wheat. 316.

weapon with which to oppose this pernicious practice that for some time spread unchecked. Nevertheless the act was attacked upon constitutional grounds. It was questioned whether it was in truth a revenue measure and a *bona fide* exercise of the power of Congress, as conferred upon it by the Constitution, or whether, under the guise of a revenue measure, it was in fact a mere subterfuge, by which the police power reserved to the States was usurped and the constitutional limitations upon Congress evaded.[4] It was urged that the real purpose of the statute was the suppression of the drug habit, and that it was therefore a police measure and consequently within the province of the States;[5] in fine, that its revenue aspect was a subterfuge and its revenue function a fiction.

"A statute," said the court in *United States* v. *Jin Fuey Moy*,[6] "must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score." If, then, the act is in reality a revenue law, it is beyond the function of the courts to question its wisdom, justice or necessity;[7] and it is not their judicial concern whether it ultimately influences the morals and habits of the citizens, or whether it is disastrous in its results. The recourse of the people, in the event Congress abuses its legitimate power to tax, is to be found, not in a court of justice, but in their own power to elect their representatives.[8] Such considerations will not change the complexion of a revenue law, if it be otherwise constitutional. Furthermore, "In construing the act the court may not recur to the views of individual members in debate, nor consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."[9] This rule of construction closes the door to any inquiry into the actual purpose of the act, as revealed by the motives that induced the individual members collectively to pass it.

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[4] United States *v.* Doremus, 249 U. S. 86.

[5] Hughes *v.* United States, 253 Fed. 543.

[6] 241 U. S. 394.

In Nicol *v.* Ames, 173 U. S. 509, the court said: "The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rests. This is particularly true of a revenue act of Congress. * * * The power to tax is the one great power upon which the whole national fabric is based. It is * * * as the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive."

[7] "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." McCulloch *v.* Maryland, *supra*.

[8] Flint *v.* Stone Tracy Co., 220 U. S. 107.

[9] Tucker *v.* Williamson, 229 Fed. 201.

While the courts are practically uniform in holding the act constitutional, they do not agree upon its real nature and the scope of its operation. The decisions are not altogether in harmony with the revenue theory of the act, but place much stress upon its "moral end" and subservient purposes. From the conservative statement that the law is a revenue measure,[10] the courts swing pendulum-like to the extreme statement that the act is constitutional not only by virtue of the right of Congress to levy taxes, but also on the principle of general public welfare. In this connection, the court said in *United States* v. *Charter*:

> "We are not content to hold that the only ground upon which the constitutionality of this act can be sustained is that it is designed to protect the revenues of the United States. The indiscriminate and unrestricted use of opium, coca, and their derivatives is well known to be a great evil, gravely affecting the general welfare of the country. These are exclusively foreign products,[11] and it is entirely within the power of Congress, in the interest of the general welfare, to exclude their importation entirely, or to so regulate the traffic in them in this country that their importations may be traced." [12]

The various regulations and restrictions in the act upon the disposition of opium, though involving no security for the collection of the tax, have been usually upheld as constitutional. Thus in *Foreman* v. *United States*,[13] the defendant claimed that the indictment charged no offense which Congress had power to create; that by paying his license fee of one dollar and by registering, all that affected the revenue was done, and that the further restraint on his business as a druggist provided by the second section of the act was an attempt to exercise the police power reserved to the States. In reply to this contention, the court said:

> "* * * Congress may make any rule or regulation which is not in itself unreasonable, although its effect on the revenue be only remote or incidental, and its effect on the public health or morals direct and obvious. * * * All the regulations of section 2 tend to promote public health and morals and doubtless that consideration influenced its enactment. But these regulations also bear directly on the revenue in

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[10] "It cannot now be questioned * * * that the Harrison Act is a revenue measure or tax law and is to be construed as such." Lowe *v.* Farbwerke-Hoechst Co., 153 C. C. A. 469, 240 Fed. 671.

[11] "* * * the court will take judicial notice of the fact that no opium is grown or produced in this country, and that the purpose of the act is to prohibit the importation of opium." United States *v.* Brown, 224 Fed. 135.

On the other hand, the court in United States *v.* Jin Fuey Moy, *supra*, said that it could not assume to know judicially that no opium was produced in the United States.

[12] 227 Fed. 331.

[13] 255 Fed. 621.

that the procurement of the drugs only on orders and prescriptions to be filed and kept, enables the officers of the government to ascertain whether unregistered persons are using the orders and prescriptions authorized by the statute. These requirements are also valuable in connection with section 1 providing for the collection of the current revenue in that the information as to the extent of the business to be derived from the orders and prescriptions filed may be of value in fixing the tax upon dealers."

Whatever may be thought of the logic of the latter part of this statement, the fact remains that the majority of the courts have upheld these regulations, holding that they do not in any way contravene the police power of the States.[14] But in declaring the statute unconstitutional, the District Court in *United States* v. *Doremus*,[15] which, however, was reversed in the Supreme Court,[16] said:

"The national act provides for an annual tax of one dollar for each registered 'dealer,' and then so restricts and narrows the uses of the drug that no vital or important excess of revenue could reasonably be expected. The tax is nominal, yet the penalty for violating any provisions of the act is so disproportionate to the gravamen of the offense as to be further convincing that Congress was more concerned with the moral ends to be subserved than with the revenue to be derived."

In another recent case, in declaring that portion of the statute unconstitutional which is not revenue in its nature, Judge Mack said:[17]

"It does not, however, follow * * * that because Congress may tax any article regardless of whether or not it be a legitimate article of interstate commerce, it may enact an intrastate prohibition law as to any such article. Its power under article 8, clause 1, of the Constitution, is only to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; not to regulate taxation through-

[14] "Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions * * * for the raising of revenue. Considered of themselves, we think they tend * * * to diminish the opportunity of unauthorized persons to obtain and sell them clandestinely without paying the tax imposed by the federal law." United States *v.* Doremus, *supra.*

It is interesting to note that four Justices, including the Chief Justice, dissented because Congress, in their opinion, had merely attempted to exercise a power not delegated, that is, the reserved police power of the States. Similarly in Webb *v.* United States, 249 U. S. 96, four Justices dissented.

[15] 246 Fed. 958.

[16] United States *v.* Doremus, *supra.*

[17] Blunt *v.* United States, 255 Fed. 332.

> out the land. And while a power to regulate interstate commerce may include the right to prohibit such interstate commerce as may be deemed harmful, the power to lay taxes on an article includes no right to make any specific use of such tax-paid article unlawful."

Thus the courts have been confronted with a measure ostensibly for revenue purposes, but in truth intended to curb the drug tendency in this country; a measure, the provisions of which on their very face declare their purpose and deny the strained interpretation often put upon them. The difficult position of the courts is well expressed in the opinion in *Lowe* v. *Farbwerke-Hoechst Co.*:[18]

> "* * * the intention of Congress must be deemed to be the providing of revenue, however difficult of reconciliation with the revenue theory is the 'moral end' of the law. This result necessarily flows from the intimation of the Jin Fuey Case, viz. that to take any other view of the nature of the statute would, to say the least, produce grave doubts of its constitutionality."

This "moral end" has been admitted by some courts to have been the very object of the statute,[19] while others, following the views expressed in the oleomargarine case, *In Re Kollock*,[20] hold that it must be assumed that the primary object of the act is the raising of revenue. And, therefore, since obtaining revenue is the outstanding purpose of the act, the ulterior motives of Congress, or the fact that the tax is also a means to an end, are not to be questioned.[21] "It is a revenue act, even though it 'has a moral end as well as revenue in view.'"[22]

If it be true, as the courts in general hold, that the statute is a revenue measure and must be so construed, it becomes difficult to follow the logic of the decisions in some cases. The statute prescribes no limit upon the quantity of the drug that a physician may prescribe or that a "dealer" may sell. The physicians and dealers are required to register, pay a license tax of one dollar and keep a record of the drugs dispensed together with the names and addresses of the patients. Yet it was held that a physician violates the terms of the statute if the amount he prescribes is unwarranted, or if he administers it, not to a sick person, or in a *bona fide* attempt to cure a drug addict by the gradual reduction of the doses, but to supply such addict with the drug he craves.

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[18] *Supra.*

[19] United States *v.* Charter, *supra.*

[20] "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue." 165 U. S. 526, 536.

[21] Hughes *v.* United States, *supra;* United States *v.* Jin Fuey Moy, *supra.*

[22] Lowe *v.* Farbwerke-Hoechst Co., *supra.*

And this, in spite of the fact that the physician had fulfilled all the requirements of the statute.[23]

Decisions of this type emphasize the moral end of the statute, revealing its true and primary object. They brush aside the veil in the form of a revenue law, and expose its naked form—the uprooting of the drug traffic and the checking of the habit. "This brings home the truth of the statement that the act in question has a moral end as well as a revenue end. The responsibility is with the courts to see that those ends are reached through a revenue measure and within the limits of a revenue measure." [24] How it is "within the limits of a revenue measure" to hold that the mere possession of the "outlawed" [25] article is a crime under the statute, is strained and vague, to say the least. Yet it has been held that: "The effect of the law is to put upon every person in the United States the burden of refusing to deal with what is upon its face contraband, unless he can show its innocent character. If, under those circumstances, he takes into his possession an article which is thus labeled contraband, he commits a violation of the statute which renders him liable to punishment unless thereafter he can save himself by obtaining the proof which he should have required before purchasing the article." [26]

If, on the other hand, the courts are not to inquire into the motives that prompted Congress to pass the act, or to take cognizance of its effect or consequences, they should confine themselves to enforcing the revenue end of the statute. The control of the moral and social well-being of the citizens of the several States is a matter for the States themselves. The courts, however, have as a rule been most assiduous in their efforts to give full force to the moral end of the statute.

Yet in the recent case of *United States* v. *Parsons,* 261 Fed. 223, the operation of the act has been limited strictly to its revenue purposes. In the words of the opinion:

> "The act is ostensibly a revenue measure, and within limits the courts must recognize it as such. At the same time any one

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[23] "The law does not mean by this to immunize those who use the form of the relation of physician and patient as a mere method to avoid the law's penalties, when in fact they are dispensing the drug, not to cure a patient, but to satisfy the craving of an addict, who bears no such relation to them. If the act were given that construction, it would be valueless to remedy the evil aimed at, since physicians could register, and with impunity furnish the drug, through pretended prescriptions, in collusion with registered druggists." Melanson *v.* United States, 256 Fed. 783.

In an earlier case, United States *v.* Friedman, 224 Fed. 276, the court held that the mere fact that the physician prescribed a greater amount than was necessary, and not in good faith and as a medicine, did not constitute a crime under the act. This decision is more in harmony with the construction that the act is a revenue measure.

[24] United States *v.* Doremus, *supra,* note 15, overruled in 249 U. S 86.

[25] United States *v.* Brown, *supra.*

[26] United States *v.* Ah Hung, 243 Fed. 762.

> with sense enough to be at large without a keeper knows the revenue feature, which possibly returns cents for dollars spent in administration, is but a fiction and device to enable Congress, otherwise disabled to suppress opium traffic and use, to hinder and obstruct such traffic and use so far as may be done incidental to exercise of revenue power. It is one of the many like and regrettable devices to evade constitutional limitations, to impose duties of the States upon the United States, and to vest the latter with nondelegated and reserved police power of the former. The limits are that, if in any such measure Congress incorporates arbitrary and unreasonable inhibitions, in that they are not calculated to promote the revenue features, but intended to promote some object not within congressional power, to that extent the statute is unconstitutional and void, and the courts are bound to so declare it."

In accordance with this declaration and with the revenue nature of the act, the court sustained the demurrer of the defendant to the indictment, in which the defendant, a physician, who had paid his license fee and duly registered, obtained the drug, by means of the required form, for his personal use. The court held that no crime was charged; that Congress can not directly prohibit the purchase of opium for personal use, and that what it cannot do directly it cannot do indirectly by incorporating such prohibition in a revenue act, especially when the prohibition has no "reasonable relation" to the revenue function of the statute. "If the section is so intended, it is to that extent unconstitutional and void."

On principle, the holding in this case appears to be sound. In spite of the necessity of legislation to combat the drug traffic, and of the success of the Harrison Act in coping with the evil, it is believed that, according to the constitutional relation existing between the Federal and the State governments, the act, in so far as it departs from the purpose of raising revenue, should be construed as an evasion of constitutional limitations and an attempted usurpation of the reserved police power of the States. However beneficent its moral object, it but represents an additional step in the series of steady and insidious encroachments upon the powers of the States—a process inevitably fraught with the gravest danger to our governmental fabric.